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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 328

GROSS INCOME TAX DIVISION, INDIANA DEPARTMENT OF STATE REVENUE, STATE OF INDIANA,
Petitioner,

vs.

W. B. CONKEY COMPANY, A CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

J. EMMETT MCMANAMON,
Attorney General;
JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General,
State of Indiana,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

May It Please the Court:

The Gross Income Tax Division of the Indiana Department of State Revenue of the State of Indiana, petitioner herein, respectfully prays that a Writ of Certiorari be issued as of and under the seal of this Honorable Court to review the opinion, decision, and judgment of the Supreme Court of Indiana on the Third (3rd) and Sixth (6th) Paragraphs of Respondent's Second Amended Complaint herein, entered in the above-entitled cause on March 17, 1950, and respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved

The Nature of the Action.

This action, commenced in the Lake Superior Court No. 5 of Lake County, Indiana (31st Judicial Circuit of Indiana), and thereafter appealed to the Supreme Court of

Indiana, is an action to recover taxes assessed and collected by petitioner under the Indiana Gross Income Tax Act of 1933, as amended. (Burns' Indiana Statutes Annotated, 1933, Sec. 64-2601 to 64-2635, (Replacement of 1943)).

The Facts.

During the taxable years involved herein, the respondent was a corporation organized and existing under the laws of the State of Illinois, but qualified and admitted to do business in the State of Indiana. Since 1905, said corporation had continuously maintained its general office, its principal place of business, and its manufacturing plant in the City of Hammond, Lake County, Indiana (R. 9, 10, 19). It was authorized to conduct a general electrotyping, lithographing, engraving, printing, binding, book manufacturing and publishing business in all of its branches (R. 9).

In the case herein, it did not act as a publisher (R. 20-23).

The income upon which the tax was assessed and collected is divided into two categories:

1. By respondent's First (1st), Second (2d), Fourth (4th), and Fifth (5th) paragraphs of complaint, respondent (as a *printer* and not a publisher) sought a refund of taxes paid upon income derived from type setting, paper work, press work and binding of books for numerous publishers, alleging interstate commerce immunity by reason of the fact that respondent physically placed said books upon the cars of interstate carriers to fulfill orders of said *publishers* with *their* out-of-Indiana customers. Said out-of-Indiana shipments were made at the direction of said *publisher,* (R. 28, 40A, 42A, 44A), at the *publisher's* expense (R. 29, 32, 34), in the name of the *publisher* as consignor (R. 40C, 44C), *to the customer of the publisher,* (R. 33, 41),

and under the publisher's label, (R. 48A), *furnished and filled in by the publisher* (R. 57, 58).

As to this category of income, the Indiana Supreme Court upheld the imposition of the tax because the income was fully earned, due and payable upon a completion-of-work basis as provided by the work order contract, even though said books were never shipped. (R. 31, 28) (R. 49, 50).

The holding of said Court on the taxability of the printing and binding income is not the subject of this Petition for Writ of Certiorari, but is mentioned to explain the case and said Court's opinion.

2. That part of the opinion, decision and judgment of the Indiana Supreme Court of which a review is sought by this Honorable Court concerns the taxability of respondent's second category of income, the review sought being confined solely to the holding of said Court as respects respondent's Third (3rd) and Sixth (6th) paragraphs of Second Amended Complaint.

Said second category of respondent's income was derived in the following manner. Respondent had an informal arrangement with one of its publishers for the furnishing of bookcases. This publisher, the Grolier Society, published the Americana Encyclopedia (R. 33, 52A, 52B) and furnished to its customers a bookcase with each set of said encyclopedia, said encyclopedia having been printed by respondent. (R. 33-35). These bookcases were manufactured in the State of Indiana, sold by the manufacturer to respondent, which in turn sold said bookcases to the Grolier Society (R. 53). *Title to said bookcases passed to the Grolier Society in Indiana at the moment of billing.* (R. 51). *Said bookcases were stored thereafter at respondent's warehouse at Hammond, Indiana,* (R. 53), *pending direction from the Grolier Society as to when and*

where said encyclopedia and bookcase should be shipped. (R. 53, 33). Upon the direction of the publisher, Grolier Society, a set of the encyclopedia and the accompanying bookcase or numbers thereof were placed on board the cars of an interstate carrier for shipment to the Grolier Society's out-of-Indiana customers. (R. 53, 13). The shipment of the bookcases was at the same time and in precisely the same manner as the shipment of books. (R. 33, 35, 53). Said out-of-Indiana shipments were made at the direction of the *publisher,* (R. 33, 53), at the *publisher's* expense, (R. 34, 29, 32), in the name of the *publisher* as consignor (R. 48A), *to the customer of the publisher,* (R. 53), *and under the publisher's label,* (R. 48A), *furnished and filled in by the publisher.* (R. 57, 58).

As to the bookcase income, the petitioner, State of Indiana, has contended and continues to contend that said second category of income was from an Indiana-intrastate sale and that the Grolier Society was the interstate shipper,—*not the respondent,—and that the respondent has no claim to interstate commerce immunity.*

However, the Indiana Supreme Court held that the second category of income was from an interstate sale by the respondent and hence immune from taxation under the Commerce Clause. It is this portion of said Court's holding to which this Petition for Writ of Certiorari is directed.

Opinion Below.

The opinion, decision, and judgment of the Indiana Supreme Court (R. 61-66), as yet unreported officially, is unofficially reported in 90 N.E. (2d) 805 of the West Reporter System. (Appendix A)

Statute Involved.

The statute involved is the Indiana Gross Income Tax Law of 1933, as amended, (Ch. 50, Indiana Acts of 1933,

Ch. 117, Indiana Acts of 1937, and succeeding amendatory acts) and may be found complete with all amendments to date in Burns' Indiana Statutes Annotated, 1933, Vol. 11, 1943 Replacement, Sec. 64-2601 to 64-2635, both inclusive. (Appendix B)

Jurisdiction

The issue of alleged interstate commerce immunity with respect to the bookcase income was raised in the court of first instance in the Lake Superior Court, No. 5, of Lake County, Indiana, by the filing of respondent's Third (3rd) and Sixth (6th) Paragraphs of Second Amended Complaint, (R. 2-5), to which the petitioner filed its answer of denial to each of said paragraphs of Respondent's Second Amended Complaint. (R. 5, 6).

The Court of first instance, Lake Superior Court, No. 5, of Lake County, Indiana, entered a general judgment against the petitioner herein on all paragraphs of Respondent's Second Amended Complaint. (R. 6, 7).

The question of alleged interstate commerce immunity was pursued from the court of first instance by the filing of petitioner's Motion for a New Trial (R. 7), which was overruled by said court of first instance (R. 7); thereafter, the question of alleged interstate commerce immunity was pursued and submitted in the Indiana Supreme Court by the filing of the Transcript of the Record, together with petitioner's Assignment of Errors (R. 1). After briefing and argument in the Indiana Supreme Court on the issue of alleged interstate immunity, that court, on March 17, 1950, entered its written opinion, decision and judgment on the bookcase income, as follows:

> "By appellee's third and sixth paragraphs of final complaint it is sought to recover the tax paid by it on the income derived from the sale of bookcases which were sold, shipped and paid for as above indicated.

The amounts sued for in these paragraphs are $391.86 and $541.50 respectively, with interest thereon from the date of their payments. It is our opinion that the sales of these bookcases were interstate transactions and the recovery on these paragraphs was proper. Each of these sales contemplated and involved at the time it was made the sale of goods to a customer in another state. The transportation of the property out of the state was within the contemplation of the contracting parties. See

Flanagan v. *Federal Coal Co.* (1925) 267 U. S. 222, 69 L. Ed. 583; 45 S. Ct. 233.

Appellants stress the point that title to these bookcases passed in Indiana. The place at which title passed is not determinative. It has been well said,

> "In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it . . ."
>
> *Penna. R. R. Co.* v. *Clark Coal Co.* (1915), 238 U. S. 456; 59 L. Ed. 1406; 35 S. Ct. 896.

The sale of these bookcases can be distinguished from the sale considered in *Dept. of Treasury* v. *Wood Corp.* (1941), 313 U. S. 62; 85 L. Ed. 1158; 61 S. Ct. 885, as there the property was actually delivered by the seller to the purchaser who accepted it in Indiana. In that case the transporting of the property out of the state was not within the contemplation of or part of the local sales contract.

We conclude that the trial court was in error when it rendered judgment for the appellee in excess of the amounts claimed by said third and sixth paragraphs of appellee's final complaint.

The judgment is reversed. Inasmuch as there is no dispute in the material evidence there is no occasion for a new trial. The lower court is therefore directed

to enter judgment for the appellants on all paragraphs of the final complaint, except the third and sixth paragraphs thereof. On these paragraphs the lower court is ordered to enter judgment for the appellee in each instance in the amount as therein prayed, and for costs." (R. 65, 66).

Thereafter, and within the time allowed by the rules of the Supreme Court of Indiana, the petitioner filed its Petition for a Rehearing and Limited Modification of said opinion, decision and judgment (R. 66-69) addressed to the Court's holding as respects respondent's Third and Sixth Paragraphs of Second Amended Complaint, which said Petition for Rehearing was denied by said Court on May 25, 1950. (R. 69, 70).

The opinion, decision and judgment of the Indiana Supreme Court was rendered by the highest court of the State of Indiana in which a decision could be had and is a final judgment, subject to no further review or correction in any other state tribunal. The issue in the case and the holding of said Court as to which a review is sought by this Honorable Court draws in question the validity of a state statute on the grounds of its being repugnant to the United States Constitution, viz., the Interstate Commerce Clause.

The statutory provisions believed to sustain the jurisdiction of this Honorable Court, are Section 1257 (3) and Section 2101 of Title 28 U. S. C. A.

The Questions Presented

The questions presented are as follows:

I. Is the sale of bookcases in Indiana an interstate sale merely because the seller, *for and on behalf of the buyer,* places the bookcases on board the cars of an interstate carrier for shipment to the *buyer's* customers, *title passing to the buyer in Indiana,* the shipment being at the direc-

tion and expense of the *buyer*, the shipment being in the name of the *buyer* as consignor, and by the use of the *buyer's* labels furnished by the *buyer* and upon which the *buyer* has designated *its* consignee?

II. Does the fact that a transaction may be subject to the paramount Federal regulatory power over commerce among the several states preclude a State from imposing a gross income tax upon a consummated local event (the sale) which precedes the interstate shipment by the buyer,—the tax being imposed upon the seller?

Petitioner's Specification of Errors.

The Supreme Court of Indiana erred:

1. In holding that the sales of bookcases by the repondent to the Grolier Society were transformed into interstate transactions merely because the seller-respondent, *for and on behalf of the buyer*, placed the bookcases on board the cars of an interstate carrier for shipment to the *buyer's* out-of-Indiana customers, for the reason that such holding is not in accord with applicable decisions of this Court.

2. In holding that recovery on paragraphs three (3) and six (6) of respondent's final complaint was proper for the reason that said Court failed to distinguish between respondent Conkey's gross-income-producing taxable event (the sale) and the *buyer's* interstate shipment of said bookcases.

3. In holding that recovery on paragraphs three (3) and six (6) of respondent's final complaint was proper for the reason that said Court failed to recognize the hiatus between respondent Conkey's gross-income-producing taxable event (the sale) and the *buyer's* interstate shipment of said bookcases.

4. In holding in effect that the seller-respondent was the interstate shipper, for the reason that said holding is not in accord with applicable decisions of this Court, nor in accord with the facts.

5. In holding that recovery on paragraphs three (3) and six (6) of respondent's final complaint was proper for the reason that said Court failed to distinguish between cases involving the paramount Federal regulatory power over commerce among the several states and local activities affecting that commerce, and cases involving the taxation of local activities which may be related to interstate commerce without conflicting with the power of Congress to regulate.

6. In holding that the "contemplation" of the *buyer* to effect an interstate shipment was controlling, for the reasons that said bookcases had come to rest within Indiana, and for the further reason that the contemplation theory is not necessarily controlling in *taxation* cases as indicated in applicable decisions of this Court.

7. In holding that "the place at which title passed is not determinative" in a *tax* case in the light of the balance of the facts, for the reason that the gross-income-producing taxable event was the passage of title to said bookcases and the control thereof to the *buyer,* which taxable event occurred within the confines of the State of Indiana, and for the further reason that said holding in a *tax* case is not in accord with applicable decisions of this Court.

8. Said Court erred in its distinguishment of the *Wood Preserving* case (313 U. S. 62), in holding that the transporting of the property in said case out of the State "was not within the contemplation of or part of the local sales contract", for the reason that said distinction is absolutely contrary to the express provisions of the sales con-

tract in said case, and erred in holding that actual delivery is required for the reason that delivery may be actual or constructive.

9. Assuming the correctness of the Indiana Supreme Court's holding that the printing and binding income was subject to the tax, said Court erred in its holding that recovery on paragraphs three (3) and six (6) of respondent's final complaint was proper, for the reason that said holding is not consistent with the balance of said opinion, since the economic impact or burden on commerce with respect to the bookcase income is the same as respects the printing and binding income and is non-existent.

Reasons Relied Upon for the Allowance of the Writ

The final opinion, decision and judgment of the Indiana Supreme Court in this case, rendered by the highest court of the State of Indiana, in which a decision could be had, draws in question the validity of a State statute on the ground of its being repugnant to the Federal Constitution, particularly the Commerce Clause. Said Court has decided this case in a way probably not in accord with applicable decisions of this Court, and it is vital that a review of said decision be made by this court for the following reasons:

1. In 1941 this Court rendered its opinion in the case of *Department of Treasury* v. *Wood Preserving Corp.*, (a *tax* case) 313 U. S. 62; 85 L. Ed. 1188; 61 S. Ct. 885. Since that time, said Wood Preserving opinion has been relied upon not only by the State of Indiana, but by other states, in support of the proposition that where a taxable event is sufficiently disjoined from ensuing interstate commerce, that a state tax upon said local event is not rendered unconstitutional merely because of subsequent, remote interstate characteristics.

Since 1941 the Gross Income Tax Division has applied said Wood Preserving decision to situations such as the instant case and the Indiana Supreme Court formerly has likewise applied said decision in cases similar to the case herein. (See *Department of Treasury* v. *Globe-Bosse World Furniture Company* (a *tax* case) (1943) 221 Ind. 201; 46 N.E. (2d) 830); likewise, Courts of other states have applied the Wood Preserving case in similar situations in said States. (See *Morrison-Knudson Company, Inc.,* v. *State Board of Equalization* (a *tax* case) (1943) 58 Wy. 500; 135 Pa. (2d) 927). On several occasions in other *tax* cases, this Honorable Court has had occasion to refer to said Wood Preserving Corporation opinion and has never reversed nor modified the same, but has explained its significance with respect to the particular case involved. The opinion of the Indiana Supreme Court herein represents an abrupt departure from and an obvious conflict with the holding of this Honorable Court in the Wood Preserving Corporation case.

2. In the instant case, the only activity of the respondent relating to interstate commerce was to physically place the bookcases on board the cars of an interstate carrier, *for and on behalf of the buyer,* for shipment to the *buyer's* out-of-Indiana customers, done solely at the direction of the buyer. As admitted in respondent's third and sixth paragraphs of final complaint, this was, in all instances, done at Hammond, Indiana. (R. 3, 4). On numerous occasions, this Court has held that the mere fact that interstate transportation may occur, either prior to or subsequent to, a local event may not of itself be sufficient to invalidate the tax, if said transportation is in aid of a local disjoined activity. (See *Department of Treasury* v. *Ingram-Richardson Manufacturing Company,* (a *tax* case) (1941) 313 U. S. 252; 85 L. Ed. 313; 61 S. Ct. 866).

In the case herein, the entire bookcase arrangement was in aid of respondent's local activity, viz., that of printing and binding. The facts in the case show a definite hiatus between respondent's gross-income-producing taxable event (the sale) and the *buyer's* interstate shipment of said bookcases, in that said bookcases were *stored after sale at respondent's warehouse in Indiana,* pending the instructions of the *buyer.*

3. The holding of the Indiana Supreme Court to the effect that the respondent was the interstate shipper is not in accord with applicable decisions of this court nor in accord with the facts, both of which indicate that the shipments herein were *for and on behalf of the buyer,* the Grolier Society, which was actually the interstate shipper. Said holding is in direct conflict with this Court's opinion in the case of *Louisville & Nashville Railroad Co.* v. *Central Iron & Coal Co.,* (1924) 265 U. S. 59, at pp. 67 and 68, which holds in effect, that under circumstances which are precisely like the case herein, that the *buyer* is actually the shipper and obligated to pay the freight charges. This is further buttressed by the fact that in the case herein, by contract, the *buyer,* Grolier Society, was obligated to pay for the interstate shipments.

4. It is noteworthy in the Indiana Supreme Court's opinion on the bookcase income, that the only case authorities therein cited are clearly not applicable, for the reason that they are not *tax* cases but cases involving the paramount authority of the Federal government to *regulate* interstate commerce. The only cases cited by the Indiana Supreme Court are *Flanagan* v. *Federal Coal Company* (1925) 267 U. S. 222; 69 L. Ed. 583; 45 S. Ct. 233, and *Pennsylvania Railroad Company* v. *Clark Coal Company* (1915) 238 U. S. 456; 59 L. Ed. 1406; 35 S. Ct. 896, neither of which is a *tax* case. This Court has been careful to

emphasize in said *regulatory* cases that the power of the Federal government to *regulate* commerce among the several states and multi-state activities in anti-trust cases and the like, are not necessarily controlling in *taxation* cases. One of the most recent expressions of this Honorable Court to that effect may be found in the case of *Central Greyhound Lines* v. *Mealey* (a *tax* case) (1948) 334 U. S. 653 at p. 655; 68 S. Ct. 1260; 92 L. Ed. 1235, in which this Court stated:

> "This case serves to remind once more that Courts do not adjudicate abstractions such as 'what is interstate commerce'; also it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a state over such transactions, offends the Commerce Clause."

The rule defining the limits of state taxation is not necessarily the same as where regulation alone is the object. Further, decisions of this Honorable Court clearly imply that there is a difference between *regulatory* cases and *tax* cases, and that where *regulation* is the objective, it may extend to transactions which, considered alone, are intra-state, but when considered in their relation to other transactions, they become interstate. On the other hand, the thought is that when *taxation* of some activity is the object, the *taxation* of an activity which is purely intra-state will not be interfered with upon the basis of the Commerce Clause merely because, when considered in its relation to other transactions, it might, perchance, be regarded as a step in a plan which is subject to regulation.

See: *Swift & Company* v. *United States,* 196 U. S. 375, at page 400;
Stafford v. *Wallace,* 258 U. S. 495, at page 525.

This distinction is further emphasized by the comparison of *regulatory* cases with *taxation* cases in cases in which the fact pattern was similar in each.

Compare: (a) *York Manufacturing Company* v. *Colley* (1918) 247 U. S. 21,

With: (b) *Stone* v. *York Ice Machinery Corp.* (1942) 10 So. (2d) 381.

In the York-Colley case (a), it was held that, because of certain interstate characteristics, York Manufacturing Company did not have to qualify to do business in a foreign state in order to recover on a contract consummated in that foreign state. Yet, in the Stone-York case (b), under a very similar set of facts, it was held that York Ice Machinery Corp. was subject to a gross income tax in a foreign state on gross receipts received from business in that State.

Compare: (c) *Indiana Farmer's Guide Pub. Co.* v. *Prairie Co.* (1934), 293 U. S. 268,

With: (d) *Indiana Farmer's Guide Pub. Co.* v. *Dept. of Treasury* (1940) 217 Ind. 627.

In the Indiana Farmer's Guide-Prairie case (c), it was held that Indiana Farmer's Guide was subject to and protected by the Sherman Anti-Trust Act because of certain interstate characteristics of its activities. Yet in the Indiana Farmer's Guide-Dept. of Treasury case (d), under a very similar set of facts, it was held that Indiana Farmer's Guide was subject to Indiana's Gross Income Tax Act.

Compare: (e) *Pennsylvania Railroad Co.* v. *Clark Coal Co.* (1915) 238 U. S. 456,

With: (f) *McGoldrick* v. *Berwind-White Co.* (1940), 309 U. S. 33.

In the Pennsylvania-Clark case (e), it was held, because of certain interstate characteristics, that the Clark Coal Co., and the Berwind-White Co. were subject to the protection of the Interstate Commerce Commission to the extent that the Pennsylvania Railroad Co. could not unjustly discriminate between said two coal companies in the distribution of coal cars. Yet in the McGoldrick-Berwind White case (f), the Berwind-White Co. was held subject to the provisions of a New York City tax laid upon sales of goods for consumption in cases in which coal mined in Pennsylvania was shipped interstate to New York City and there sold.

The many cases wherein a state *tax* has been upheld by this Court, notwithstanding an actual *regulation* by a *Federal agency, under the commerce clause,* the language used in *regulatory* cases which cautions readers that said cases are not necessarily applicable in state *tax* cases, and the comparison of the foregoing *regulatory* cases with *tax* cases under similar circumstances, clearly indicates that the rule defining the limits of state *taxation* is not necessarily the same as where *regulation* alone is the object. It is clear, therefore, that the Indiana Supreme Court was in error when it concluded that the *regulatory cases* cited by it *control* the case herein. *In the absence of any other case authorities cited by the Indiana Supreme Court, its decision on the bookcase income is without any applicable tax case authority.*

5. While the place of passage of title is not determinative in questions concerning the power of Congress to *regulate* interstate commerce, it is important in *taxation* cases because it protects the taxpayer from the multiple burden of taxation by denying all States the power to tax, except *one* State,—that State being the one in which the sale is made, i.e. where title passes. Since the taxable

event was complete in Indiana, *the tax could not be repeated in any other State.*

The case of *McLeod* v. *Dilworth* (a *tax* case) (1944) 322 U. S. at p. 328, illustrates this point and the holding in the McLeod-Dilworth case would preclude any state other than Indiana from taxing the respondent's income from the sales of said bookcases. To paraphrase what this Court said in the McLeod-Dilworth case in the Conkey case—the respondent was through selling in Indiana.

This Court in the *McLeod-Dilworth* case said, at page 328:

> "Title passed upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas; in short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas."

And again, at page 330 of the *McLeod-Dilworth* case, this Court held:

> "In this case, the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee."

Thus, in the case herein, the passage of title and control of said bookcases to the buyer in Indiana, would be a complete *bar* against any state other than Indiana, if other states should attempt to tax respondent's income from these sales.

6. The Indiana Supreme Court was in error in applying the contemplation theory to the case herein for the reason that that theory applies to the question of the paramount Federal *regulatory* power over commerce among the several states and multi-state activities.

In the case of *Minnesota* v. *Blazius* (a *tax* case) (1933) 290 U. S. 1, at page 9, this Court said of the question of contemplation in a *tax* case:

> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it."

And at page 10 of the *Blazius* case this Court further said:

> "Where property has come to rest within a state, being held there at the pleasure of the owner for disposal or use so that he may dispose of it either within the State or for shipment elsewhere as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

Thus it would seem to the petitioner herein that the contemplation theory, which is the only theory upon which the Indiana Supreme Court relies, is not applicable to the type of case herein which is a *tax* case—not a *regulatory* case.

7. The Indiana Supreme Court's attempted distinguishment of the *Wood Preserving Corporation* case, viz., that in that case the transportation out-of-state "was not within the contemplation of or part of the local sales contract" is absolutely contrary to the express provisions of the sales contract in the *Wood Preserving Corporation* case (see certified copy of Brief in support of Petition for Rehearing—Appendix). See also Transcript of Record in the case of *Department of Treasury* v. *Wood Preserving Corporation* in the United States Supreme Court, October Term 1940, #654.

The Indiana Supreme Court in its discussion of the Wood Preserving case has attached an improper impor-

tance to the fact that in that case the railroad ties were actually delivered by the seller, Wood Preserving Corporation, to the purchaser, the railroad, which accepted said ties in Indiana. In the *Wood Preserving Corporation* case, the reason for the importance of actual delivery and acceptance by the buyer, the railroad company, in Indiana, was to overcome the fact in that case that the ties were shipped in the name of the Wood Preserving Corporation —seller, as consignor—which raised the rebuttable presumption that the Wood Preserving Corporation still owned said ties; no such presumption appearing in the *Conkey* case herein, actual delivery and acceptance in Indiana were not required.

8. Assuming the correctness of the Indiana Supreme Court's upholding the taxability of the printing and binding income in this case, it would seem to the petitioner that the holding of said court on the bookcase income is not consistent with the balance of said opinion since the economic impact or burden on commerce with respect to said bookcase income is the same as respects the printing and binding income and is nonexistent. The bookcases herein, although not made by the respondent, were sold to the Grolier Society and stored in the warehouse of the respondent along with the books; both books and bookcases were shipped at the same time at the direction of the Grolier Society and in the same manner, being shipped in the name of the Grolier Society and at the expense of the Grolier Society; thus, it would appear that there is an obvious inconsistency in the two holdings.

Conclusion

This case is one of general public interest concerning a fact pattern which frequently and regularly occurs, not only as respects this taxpayer but as respects other tax-

payers, both in the State of Indiana and in other States. It is vital to the public officials administering the Gross Income Tax Law, the same being a revenue measure, that a review of the lower court's opinion be had for guidance of said authorities.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued as of and under the seal of this Honorable Court directed to the Supreme Court of Indiana, that a review of the case herein be made by this Honorable Court and that the opinion, decision and judgment of the Indiana Supreme Court with respect to Paragraphs three (3) and six (6) of respondent's final complaint, be in all things reversed and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

J. EMMETT MCMANAMON,
Attorney General,
State of Indiana,
JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General,
State of Indiana,
Counsel for Petitioner.

APPENDIX A

Conflicting Opinion

(Omitting Caption and Formal Parts)

(The following opinion of the Indiana Supreme Court is as yet unreported officially but is unofficially reported in 90 North Eastern Second 805 of the West Reporter System.)

"This is an action by the appellee, a foreign corporation licensed to do business in Indiana, to recover certain sums paid as taxes, under the Gross Income Tax Act of Indiana, for the years 1941 and 1942. The provisions of this Act, under which these taxes were imposed, are set out in § 64-2602, Burns' 1943 Repl.

The income from which the taxes involved in this case arose was derived from the printing and binding by appellee of books for its various customers and from the sale of bookcases by it to one of these customers. The appellee maintained a large printing and binding establishment at Hammond, Indiana. It was at this establishment that all the books were produced and all the bookcases were sold.

The business of printing and binding books was conducted in the following manner: All of the books were made by appellee on order of its various customers who were in each instance the publisher of the book to be made. For this work to be performed appellee entered into formal written contracts with its customers, except in case of a few of its well-known customers the contractual relation was established by correspondence rather than in a formal type of contract.

By the terms of all these orders or contracts the publisher customer would furnish the manuscript containing the copy which was to be produced in printed form and bound into a book. This manuscript remained the property of the customer. In these contract orders the appellee furnished all the material used in the making of the books except in certain instances the customer furnished the paper so used.

After the books were finished appellee was obligated to pack them for shipment. All of these books were to be delivered by the appellee to the carrier. All shipments were in the name of the customer to the one designated by the customer's written shipping order instruction. Generally the shipping order was that the books should be sent in the name of the customer to the one to whom he had made a sale of the books. Some customers, however, made their own distribution to their customers. Under these circumstances the customer's shipping order to the appellee would be to ship in the customer's name to one of his distribution warehouses. The customer always paid the freight, advanced by the appellee. By the terms of some of these contracts delivery to the carrier was to be f.o.b. Hammond, Indiana, by others f.o.b. Chicago, Illinois. There was a custom of the trade which was part of each of these contracts which required the appellee to set apart for its customer and store in stockrooms on its premises at Hammond all finished books appropriately identified and packed for shipment, to be withdrawn by it from such space and delivered to the carrier as the customer sent shipping instructions. No charge was made by appellee for this service.

Appellee was paid by its customers for the making of books as the work progressed and the final payment was usually due at the completion of the binding operations. However, in some contracts it was provided that the final billing would be made as the books were shipped, with the proviso that any books on hand and unshipped twelve months after the date of the first delivery of bound books to the stockroom were then billable regardless of the fact that they had not been shipped.

Under these arrangements appellee was bound to send the books it manufactured to any place it was directed by its customers but no contract for printing provided where shipments were to be made. That remained the option of the customer. Appellee's charges were the same, irrespective of whether or not the shipments were interstate or intrastate or whether or not there was a shipment at all.

All of the books from which the involved income was

derived were ordered by out of state customers and were consigned to out of state points. This income was about 95 per cent of appellee's gross business.

One of appellee's out of state customers published an encyclopedia which appellee printed and distributed for this customer in the manner above described. By a separate agreement with this customer appellee purchased bookcases and caused them to be sent with each set of this encyclopedia when instructed by its customer so to do. These bookcases were billed at an agreed price to this customer who would then pay appellee for them. The tax on the income derived by appellee from bookcases sent to consignees outside of Indiana is here in question. The total amount of this income is not in dispute.

According to the evidence most favorable to the appellee the appellee agreed with some of its out of state customers here involved to cause shipment to be made f.o.b. Hammond, Indiana, or Chicago, Illinois; with the remainder of its customers the agreement was to cause shipments to be made f.o.b. Hammond.

Upon the above facts the trial court gave judgment for the appellee upon the theory that all the transactions were in interstate commerce and therefore not taxable by the State of Indiana, being in violation of Article 1, § 8 of the Federal Constitution.

Appellee contends that the gross receipts from its manufacturing operations upon which the gross income tax was levied were derived from the manufacture and sale of books in interstate commerce and not from the mere rendition of local service.

It would seem to us that as to the printing and binding of books, as here, the appellee was rendering a local service and the gross receipts therefrom are not from interstate commerce. What appellee was being paid for was the services rendered and its materials used in an activity purely local in its nature.

Dept. of Treasury of Indiana v. *Ingram-Richardson Mfg. Co.*, (1941), 313 U. S. 252, 85 L. Ed. 1313, 61 S. Ct. 866;

Western Live Stock v. *Bureau,* (1938), 303 U. S. 250, 82 L. Ed. 823, 58 S. Ct. 546.

Its contracts were not for the sale of books, nor for a sale of the materials furnished by appellee which went into the books, but for work, labor and materials which ultimately resulted in the transfer of a chattel made especially for the buyer and not suitable for sale to others in the ordinary course of appellee's business. By the weight of authority in this country such a contract would not amount to a sale.

46 Am. Jur., Sales, § 12, p. 206;
Yoe v. *Newcomb,* (1904), 33 Ind. App. 615, 71 N.E. 256.

Also by the adoption of the Uniform Sales Act this state has recognized the rule that contracts such as we have here are not contracts for the sale of goods. § 58-104, sub-section 2, Burns' 1943 Repl. There are decisions such as *Sidney Stevens Implement Co.* v. *Hintze,* (1937), 92 Utah 264, 67 Pac. 2d 632, and *M. K. Smith Corp.* v. *Ellis,* (1926), 257 Mass. 269, 153 N. E. 548, wherein it has been indicated that after the completion and acceptance and delivery of the particular article involved the transaction would become a sale of the article. Whether any such transaction might ever become a sale we need not decide. We do not believe, however, where, as here, the contract is for the printing of a book that the transaction would ever become or result in a sale. After delivery the appellee's claim would still be for work, labor and material. Even in England where the rule is liberal as to what are contracts of sale, it has been said, "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; *but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book*

would most probably fall within the same catagory.'' (Our italics.)

Lee v. *Griffin,* 1 Best & Smith 272, 121 Eng. Reprint 761, 23 Eng. Rul. Cas. 191.

See also

J. A. Burgess Co. v. *Ames,* (1935), 359 Ill. 427, 194 N.E. 565;

H. G. Adair Printing Co. v. *Ames,* (1936), 364 Ill. 342, 4 N.E. 2d 481.

Appellee was the printer and not the publisher of books. Its gross income did not depend upon the acceptance of books. It came from a work order and not from a purchase order. Its income was earned when the books were completed.

The fact that the orders for the printing and binding of books were obtained from non-resident customers did not make the manufacturing process an interstate activity.

Western Live Stock v. *Bureau, supra.*

None of the service was in aid of the shipment and sale of merchandise in interstate commerce as was the case in

Gwin, etc., Inc. v. *Henneford,* (1939), 304 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325.

The delivery of the books by appellee to the carrier in the manner as above pointed out was but an incident to and in aid of its local printing and binding business as was the case in

Dept. of Treasury v. *Ingram-Richardson, supra.*

It has been said there is a distinction between sales made with a view to a certain result and those made with indifferent knowledge that the buyer contemplates that result.

Superior Oil Co. v. *Mississippi,* (1930) 280 U. S. 390, 74 L. Ed. 504, 50 S. Ct. 169.

We think this principle applies not only to sales but to contracts for services such as we have before us. In the case at bar the customer was always the consignor and the

one engaged in interstate commerce. The appellee did not manufacture the books to be sold in another state. It was not interested in where the books it printed would finally land—that was the concern of and dependent upon the wishes of appellee's customers.

By appellee's third and sixth paragraphs of final complaint it is sought to recover the tax paid by it on the income derived from the sale of bookcases which were sold, shipped and paid for as above indicated. The amounts sued for in these paragraphs are $391.86 and $541.50 respectively, with interest thereon from the date of their payments. It is our opinion that the sales of these bookcases were interstate transactions and the recovery on these paragraphs was proper. Each of these sales contemplated and involved at the time it was made the sale of goods to a customer in another state. The transportation of the property out of the state was within the contemplation of the contracting parties. See

Flanagan v. *Federal Coal Co.* (1925), 267 U. S. 222, 69 L. Ed. 583, 45 S. Ct. 233.

Appellants stress the point that title to these bookcases passed in Indiana. The place at which title passed is not determinative. It has been well said, "In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it——."

Penna. R. R. Co. v. *Clark Coal Co.,* (1915), 238 U. S. 456, 59 L. Ed. 1406, 1410, 35 S. Ct. 896.

The sale of these bookcases can be distinguished from the sale considered in *Dept. of Treasury* v. *Wood Corp.* (1941), 313 U. S. 62, 85 L. Ed. 1188, 61 S. Ct. 885, as there the property was actually delivered by the seller to the purchaser who accepted it in Indiana. In that case the transporting of the property out of the state was not within the contemplation of or part of the local sales contract.

We conclude that the trial court was in error when it rendered judgment for the appellee in excess of the amounts claimed by said third and sixth paragraphs of appellee's final complaint.

The judgment is reversed. Inasmuch as there is no dispute in the material evidence there is no occasion for a new trial. The lower court is therefore directed to enter judgment for the appellants on all paragraphs of the final complaint, except the third and sixth paragraphs thereof. On these paragraphs the lower court is ordered to enter judgment for the appellee in each instance in the amount as therein prayed, and for costs.

Emmert and Young, JJ, not participating."

APPENDIX B

PERTINENT SECTIONS OF INDIANA GROSS INCOME TAX LAW

(The Indiana Gross Income Tax Law of 1933 as amended by Ch. 117 of the Indiana Acts of 1937 and succeeding amendatory acts may be found complete with all the amendments to date in Burns' Indiana Statutes Annotated 1937, Volume 11, 1943 Repl. § 64-2601 to § 64-2635 both inclusive. Reproduced herewith are two sections of the Gross Income Tax Law which are believed to be pertinent in the determination of the case herein.)

Section 2 of Ch. 117 of the Acts of 1937

(Burns' Indiana Statutes Annotated 1933, Volume 11, 1943 Repl. § 64-2602.)

"Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of

Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 6a of Ch. 117 of the Acts of 1937.

(Burns' Indiana Statutes Annotated 1933, Volume 11, 1943 Repl. § 64-2606a.)

"Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America, and interest or other earnings paid upon bonds or other securities issued by the United States of America, but only to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest, and/or earnings, by the Constitution of the United States of America."